No. 91-597

Supreme Court, U.S.
FILED
OCT 30 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

HOUSTON BUILDING SERVICE, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD and UNLICENSED DIVISION OF DISTRICT NO. 1, MEBA/NMU, AFL-CIO,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT UNLICENSED DIVISION OF DISTRICT NO. 1, MEBA/NMU, AFL-CIO

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QUESTIONS PRESENTED

1. Whether the finding and conclusion of the National Labor Relations Board that Houston Building Services, Inc. ("HBS"), had an obligation to recognize and bargain with the Unlicensed Division of District No. 1, MEBA/NMU, AFL-CIO*, is supported by substantial evidence in the record when considered as a whole.

2. Whether the Board's conclusion that HBS unlawfully changed terms and conditions of employment without first bargaining with the Union is supported by substantial evidence in the record when considered as a whole.

3. Whether an employer which hires the employees of its predecessor without advising them that they are to be employed on a temporary basis is obligated to recognize and bargain with the Union which had a collective bargaining relationship with the predecessor, when the majority of the successor employer's employees had been employed at the same location by the predecessor and had performed the same duties under similar supervision.

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* The Union is affiliated with the National Marine Engineers' Beneficial Association, AFL-CIO.

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Citations ii

Opinions Below 1

Statement of the Case 2

Summary of the Argument 3

Reasons for Denying the Writ 4

Conclusion 7

TABLE OF CITATIONS

Cases Cited:

Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27 (1987) 3, 4, 5, 7

NLRB v. Burns International Security Services, Inc., 406 U.S. 272 (1972) 3, 4, 5, 7

Rule Cited:

Rule 10 of Rules of Supreme Court of United States 6

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OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals is reported at 926 F.2d 178 (1991). That opinion affirmed the decision and order of the National Labor Relations Board ("NLRB" or "Board"), which is reported at 296 NLRB No. 101 (1989).

Contrary to the statement set forth on page 2 of the petition for writ of certiorari filed herein, there was no formal finding "in favor of HBS" by the NLRB Regional Director herein nor any appeal by the Board. Rather, the Regional Director initially refused to issue complaint based upon the charge filed by the Unlicensed Division of District No. 1, MEBA/NMU, AFL-CIO ("Union"), but was overruled by the Board's general counsel upon the Union's appeal and thereupon issued the complaint which gave rise to the administrative hearing below.

STATEMENT OF THE CASE

While the facts stated in Sections "1", "2" and "3" of the petitioner's Statement (at pp. 3-5 of its petition for writ of certiorari) are essentially correct, many salient facts are omitted.[1] Assuming *arguendo* that petitioner Houston Building Service, Inc. ("HBS" or "petitioner"), did intend to hire employees other than those of its predecessor but was unable to do so because it was not able to obtain security clearances,[2] it admitted (and the NLRB appropriately found) that all of its initial employees had been employed by its predecessor and that it had to keep those employees on the job in order to be able to fulfill its contract with the government (*see* J.A. 2a, 18a-20a, 24a-25a). HBS, moreover, admitted that it did not inform the employees that they were hired on a temporary basis (*see* J.A. 6a, 8a-9a [fn. 2], 18a-20a, 31a-32a). According to petitioner's attorney during oral argument before the Fifth Circuit, HBS could not have advised the employees

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1. Sections "4" and "5" of the Statement are actually argument and, therefore, will not be addressed in this portion of respondent Union's brief in opposition.

2. HBS's motivation or anti-union animus was not a factor which had to be proven to establish the unfair labor practices alleged in this proceeding and, consequently, was not litigated before the NLRB.

of their purported temporary status as they may then have refused to work for the company under those conditions and the company's president, Jason Yoo, was "desperate" in his need for them at that time.

Petitioner's rendition of the facts of this case also omits the finding of the NLRB, based on the undisputed evidence, that, at the request of HBS's supervisors, its predecessors' workers completed employment applications and union cards, some before and some after that company had become the contractor at the Austin federal buildings. The employees reported for work on the first day HBS became the contractor and performed their duties, as they had done during the other changes of employer over the prior several years. (*See* J.A. 5a, 17a, 19a-20a, 29a.) These employees performed the same work at the same locations for, essentially, the same supervisors as they had under HBS's predecessor (J.A. 29a-30a).

SUMMARY OF ARGUMENT

The decision of the Fifth Circuit does not conflict at all with the precedent of this Court, but rather is fully in compliance with that precedent. As HBS mysteriously mentions only twice[3] and in passing, the "decision" with which it asserts the Court of Appeals' determination is in conflict is, in fact, not the holding of this Honorable Court at all, but a dissenting opinion in *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972) ("*Burns*"). The decision below faithfully follows the decisions of this Honorable Court in *Burns* and in *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987) ("*Fall River*"),

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3. Once in a footnote to its statment of the "Questions Presented" (at which petitoner inconsistently refers to "the favorable decision of Mr. Chief Justice Rehnquist . . . in his dissent") and the other time in the first heading of its argument.

to which this Court should continue to adhere. Petitioner, therefore, has not stated a valid basis for this Honorable Court to grant a writ of certiorari herein.

REASONS FOR DENYING THE WRIT

The decision by the Court of Appeals is consistent with the precedent established by this Honorable Court.

In *Fall River, supra* at 43, this Court held that, when analyzing whether a successorship situation exists, the Board is to view the facts from the perspective of the employees — *i.e.*, whether they perceive themselves as being "in essentially the same jobs after the employer transition . . . " This is precisely what the NLRB and the Fifth Circuit did in this case when they determined that the employees who had worked for HBS's predecessor viewed themselves as continuing to perform the same duties for HBS as they had always performed at the locations in question and that HBS had not given them any reason to believe that they were temporary employees. The alleged short-term necessity of employing these workers and the supposed plans of HBS to bring in other workers if and when they received security clearances[4] is, accordingly, irrelevant.

Petitioner tries to distinguish *Fall River* by asserting that it did not purchase its predecessor or any of its predecessor's assets, but "merely" took over its employees to perform the same duties at the same location under, generally, the same supervision. These facts, thus, are strikingly similar to the situation in *Burns*, which this Court reaffirmed in its decision in *Fall River*. That earlier case involved a contractor which took over the guard service operation for a third party from a competitor, hiring the same

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4. Some of the new employees supposedly hired by HBS never received their security clearances and were never employed in the unit (J.A. 17a-18a).

people to perform the same work at the same location. This Court required that successor to recognize and bargain with the union which had been the employees' representative when they worked for the predecessor, as the bargaining unit was basically unchanged. *Burns, supra* at 280-281.

The central holding of both *Burns* and *Fall River* is that:

> If the new employer makes a conscious decision to maintain generally the same business and to hire a majority of its employees from the predecessor, then the bargaining obligation of § 8(a)(5) is activated. This makes sense when one considers that the employer *intends* to take advantage of the trained work force of its predecessor.

Fall River, supra at 41 (emphasis in original).

The findings in the current proceeding were that HBS made a conscious decision to bid for and perform the work that had been performed at the federal buildings in Austin, Texas, by its predecessor and that it intended to and did "take advantage of the trained work force of its predecessor." (*See* J.A. 2a, 6a, 29a-31a.) HBS has admitted that it needed to keep the employees at their jobs because they were the only ones with the necessary security clearances at that time and, without them, it would not have been able to provide the services required by the government. Given its alleged intent to replace those workers, HBS took advantage of them in another sense as well — intentionally failing to inform them that they would only be kept temporarily because it knew they would not otherwise agree to work for it.

Burns has been followed by the NLRB and the courts for

almost twenty years[5] and has helped stabilize collective bargaining relationships, as its holding provides for continuity of representation by the employees' chosen labor organization. This is particularly true in the service contract industry involved in this proceeding. As was noted by the court below (J.A. 2a), HBS was the fifth employer of this unit in seven years. Thus, if the Union had to seek NLRB certification each time there was a change of employer and to pursue unfair labor practice charges once the employer continued its refusal to recognize and bargain, the employer would have departed before there was an enforceable order and the unit employees would effectively be deprived of their right to representation. Significantly, by the time oral argument was scheduled before the Court of Appeals in this case, petitioner was no longer the employer of the unit at the Austin federal buildings.

It must, therefore, be concluded that the Fifth Circuit's decision is consistent with the well-considered precedents of this Honorable Court; and that HBS has utterly failed to state a valid basis under Rule 10 of the Rules of the Supreme Court of the United States for a writ of certiorari to be granted.

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5. Interestingly, petitioner has not been able to cite a single decision by any Court of Appeals which supports its premise that a successor service contractor should be treated any differently than a purchaser of assets.

CONCLUSION

For the foregoing reasons, this Honorable Court should deny HBS's petition for writ of certiorari herein and should adhere to its decisions in *Burns* and *Fall River*.

Respectfully submitted,

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